



## NORTHWEST ENVIRONMENTAL DEFENSE CENTER

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SUBMITTED ONLINE at

<https://foiaonline.regulations.gov/foia/action/registered/createRequest/>

### **Re: Freedom of Information Act Request for Title V Permit Application No. 26913**

To the EPA Region 10 FOIA Officer:

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, the Northwest Environmental Defense Center ("NEDC") requests copies of public records in the custody of the Environmental Protection Agency ("EPA"), Region 10, identified below.

NEDC is a nonprofit environmental organization with its principal place of business in Portland, Oregon. It is an independent organization that was established by a group of professors, law students, and attorney alumni at Lewis and Clark Law School in 1969. NEDC is comprised of citizens, attorneys, law students and scientists. NEDC's mission is to protect the environment and natural resources of the Pacific Northwest by providing legal support to individuals and grassroots organizations with environmental concerns, and by engaging in education, advocacy and litigation independently and in conjunction with other environmental groups.

Cascade Kelly Holdings, LLC, owned by Global Partners, LLC, dba Columbia Pacific Bio-Refinery (hereafter "Columbia Pacific"), located at 81200 Kallunki Road in Clatskanie, Oregon 97016-2244, holds an air contaminant discharge permit ("ACDP") issued by the Oregon Department of Environmental Quality ("DEQ"), ACDP No. 05-0006-ST-01. On February 14, 2013, DEC received Columbia Pacific's Annual Report as required by the ACDP with a cover letter stating that the facility had "submitted a timely Title V permit application (No. 26913) on June 29, 2012 as required by the Tailoring Rule." NEDC reviewed DEQ's file for ACDP No. 05-0006-ST-01, but DEQ's file does not contain a copy of the Title V application.

### **Requested Records**

NEDC respectfully requests a copy of the Title V permit application No. 26913, submitted to EPA Region 10 by Columbia Pacific or forwarded to EPA Region 10 by DEQ. NEDC also requests any and all records of communications related to the Columbia Pacific facility in Clatskanie regarding the applicability of the Clean Air Act requirements made by or between EPA, Columbia Pacific, or DEQ.

This request applies to all such records in whatever form, including (without limit) correspondence, memoranda, notes, telephone conversation notes, e-mail messages and electronic files, the release of which is not expressly prohibited by law. It also covers any non-identical duplicates of records that, by reason of notation, attachment, or other alteration or supplement, include any information not contained in the original record. This request is not meant to be exclusive of other records that, though not specifically requested, would have a reasonable relationship to the subject matter of this request. To save resources and mailing expense, we request electronic copies of these documents if available.

### **Exempted and Nonexistent Documents**

Please include in your response an explanation of which documents, if any, may be privileged or exempt from this FOIA request and why. 40 C.F.R. § 2.104(f). If you claim that the records should not be disclosed, please justify your refusal by referring to the specific exemption that you are invoking under the FOIA. *Id.* § 2.104(h)(2). Also, please provide those portions of documents with information requested that are not specifically exempted from disclosure. If the documents do not exist, please indicate that in your written response. We reserve the right to appeal any denial. *Id.* § 2.104(j).

### **Request for Fee Waiver**

NEDC requests that you waive all fees in connection with this request. FOIA carries a presumption of disclosure and the fee waiver was designed specifically to allow nonprofit, public interest groups, such as NEDC, access to government documents without the payment of fees. The courts have stated that the statute “is to be liberally construed *in favor of waivers* for noncommercial requesters.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (quoting 132 Cong. Rec. S14298 (Sept. 30, 1986) (Sen. Leahy)) (emphasis added). As shown below, NEDC meets FOIA’s two-pronged test for a fee waiver because it is both in the public interest and not primarily in the commercial interest of NEDC. 5 U.S.C. § 552(a)(4)(A)(iii); *see* 40 C.F.R. § 2.107(l).

#### **I. Disclosure of this information is in the public interest because it will significantly contribute to public understanding of government operations and activities.**

Under FOIA and the EPA’s regulations, the fee associated with document production is waived if release of the information is in the “public interest.” 5 U.S.C. § 552(a)(4)(A)(iii) (“documents shall be furnished without any charge . . . if disclosure of the information is in the public interest”); 40 C.F.R. § 2.107(l)(1)(c). NEDC qualifies for the fee waiver because the requested information will contribute significantly to the public understanding of government operations or activities and is thus in the public interest.

##### **A. The subject of the request directly concerns “the operations or activities of the government.”**

The information requested concerns the operations and activities of the government because the requested documents concern information required by federal statute that was submitted to EPA. The requested information also may contain communications by and between

EPA and DEQ regarding the application of the Clean Air Act to a private facility. More generally, the requested information relates to EPA action in its oversight capacity of DEQ's implementation of the Clean Air Act in Oregon.

**B. The disclosure is “likely to contribute” to a public understanding of government operations or activities.**

The information is likely to contribute to public understanding of government operations and activities by providing an otherwise unavailable window regarding implementation of the Clean Air Act in Oregon. 40 C.F.R. § 2.107(l)(2)(ii). As noted above, the requested Title V permit application was referenced, but not included in, the permit file maintained by DEQ. By providing information that is not otherwise publicly available, EPA's disclosure is likely to contribute to greater understanding of government operations in implementing the Clean Air Act. Therefore, disclosure is likely to contribute to a public understanding of government operations or activities.

**C. The disclosure of this information will contribute to “public understanding” of the subject.**

NEDC will use this information to contribute to the public understanding of Columbia Pacific's operations and the extent to which the facility is subject to regulation under the Clean Air Act. 40 C.F.R. § 2.107(l)(2)(iii). Information that could “support oversight of [an agency's] operations” is precisely the type of information that Congress considered to have a “high potential for contribution to public understanding.” *McClellan Ecological*, 835 F.2d at 1286. NEDC, long known for its leadership role in ensuring agency compliance with federal law, uses a combination of education, research, and advocacy to advance its mission of informing the public on how governmental actions impact Washington's precious natural resources.

NEDC has an interest in protecting the quality of Oregon's environment and in particular the quality of air in the state. NEDC will draw on its expertise and existing connections to communities surrounding Columbia Pacific's facility to disseminate this information. Based on its connections to the broader community concerned with environmental quality in Washington, NEDC will act as a conduit providing access to this information which is not already available in the public domain.

**D. The disclosure will contribute “significantly” to public understanding of government operations or activities.**

The disclosure of Columbia Pacific's Title V permit application and related communications between EPA, DEQ, and Columbia Pacific will significantly contribute to the public understanding of EPA's operations and activities in Oregon. 40 C.F.R. § 2.107(l)(2)(iv). In determining whether the disclosure of requested information will contribute significantly to public understanding, a guiding test is “whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject.” *Carney v U.S. Dept. of Justice*, 19 F.3d 807, 815 (2d Cir. 1994). NEDC is comprised of professionals with scientific and legal expertise who regularly write, speak, and teach on environmental compliance and other issues regarding environmental quality in the Pacific Northwest region.

After reviewing the information, NEDC intends to use its resources and expertise to inform and educate volunteers, members and supporters about environmental violations in Oregon. NEDC will further the public understanding by providing this information to other groups engaged in public outreach regarding Columbia Pacific's actions under the Clean Air Act, including Columbia Riverkeeper and Neighbors for Clean Air. The information will be disseminated through our website, electronic news bulletins, newsletter, and other publications, all of which are available free of charge to interested parties. NEDC is uniquely qualified to disseminate the information to a large cross-section of the population.

## **II. Obtaining the information is of no commercial interest to NEDC.**

The second element of the fee waiver analysis addresses the requester's "commercial interest" in the information. To determine if the request is made primarily for the commercial benefit of the requester, EPA regulations examine two relevant factors. 40 C.F.R. § 2.107(l)(3). The first factor considered is "whether the requester has a commercial interest that would be furthered by the requested disclosure." 40 C.F.R. § 2.107(l)(3)(i). As a 501(c)(3) nonprofit, NEDC has no commercial, trade or profit interest in the material requested. NEDC will not be paid for, or receive other commercial benefits from the publication or dissemination of the material requested. Therefore, NEDC does not seek this information for any use that furthers a commercial interest.

The second factor hinges on "the primary interest in the disclosure." 40 C.F.R. § 2.107(l)(3)(ii). The identified commercial interest cannot be significantly more substantial than the public interest. *Id.* There is great public interest in the release of the materials sought because they will allow for a more thorough analysis of Columbia Pacific's operations and the extent to which its records demonstrate it should be subject to Clean Air Act regulation. Thus, assuming *arguendo*, that NEDC had some "commercial" interest in the documents requested, a complete fee waiver would still be appropriate because NEDC's primary interest in the material is to inform the public about the operations and activities of the government that affect environmental quality in Oregon. Therefore, the disclosure of the information is not "primarily in the commercial interest of" NEDC, and a fee waiver is appropriate.

## **Conclusion**

As provided by FOIA, 5 U.S.C. § 552(a)(6), and EPA's own regulations, 40 C.F.R. § 2.104(a), I trust that I shall receive a reply to this request within twenty business days of receipt. Thank you for your time and attention in this matter, and look forward to hearing from you shortly. If you have any questions, feel free to contact NEDC at (503) 768-6673.

Sincerely,



Marla Nelson  
Legal Fellow